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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1357 117

RICHARD V. JENKINS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN J. BOUHAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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RICHARD V. JENKINS,

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THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Richard V. Jenkins, respectfully represents as follows:

1. That at the May Term 1944, the Grand Jury of the Southern District of Georgia, Savannah Division, returned three Indictments, Numbers 10795, 10796 and 10797 against petitioner (appellant in this case). These indictments charged petitioner (appellant in this case) with willful violation of Section 3253, Title 26, of the United States Code, in that petitioner (appellant in this case) at various times, in several counts in Georgia, located in different Divisions

of the Southern District of Georgia, carried on the business of a wholesale liquor dealer without having paid the special tax required by law. By agreement the three indictments were consolidated, and were tried in the Savannah Division of the Southern District of Georgia, on the 14th of November, 1944. The first named indictment contained one count, the second indictment contained two counts, and the third indictment contained two counts. Petitioner (appellant in this case) pleaded not guilty to all of the said indictments. The case was concluded on the 15th of November, 1944, and a verdict of Guilty was returned by the trial jury, on November 16, 1944, on each and every count of all three indictments. Sentence was imposed upon petitioner (appellant in this case) by the Judge of the Trial Court, aggregating two and one-half years imprisonment in the Federal Penitentiary and a fine of Ten Thousand (10,000) Dollars.

2. Petitioner (appellant in this case) appealed his conviction and sentence as aforesaid to the United States Circuit Court of Appeals for the Fifth Circuit.

3. That the said Circuit Court of Appeals by its judgment or decree entered in said Court, on May 9, 1945, affirmed petitioner's conviction and sentence under all the counts and all three indictments.

4. That on the 23d of May, 1945, petitioner duly filed a motion in said Circuit Court of Appeals for a stay of the mandate of said Court in said case pending the filing in this Honorable Court of his application for the writ of certiorari from this Court to the United States Circuit Court of Appeals for the Fifth Circuit, which motion was on May 23, 1945 duly granted, and an order of stay made thereon.

5. Your petitioner believes that the aforesaid judgment or decree of the said Circuit Court of Appeals was erroneous and that this Honorable Court should require the case

to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases, and sets forth briefly the reasons for such belief as follows:

(A) The said Circuit Court of Appeals erred in sustaining the Trial Court in its refusal to grant petitioner's motion for a direction of a verdict of not guilty upon each and every count of the three said indictments, upon the ground that the evidence as shown by the record in said case failed to prove a violation of said Section 3253, Title 26, of the United States Code; that the evidence in said record failed to support said counts, failed to prove petitioner's guilt thereunder, and failed to show any evidence whatsoever to support a verdict of guilty on any one of said counts; it being petitioner's contention in the Trial Court and in the Circuit Court of Appeals under assignment of error, that the evidence disclosed that the whisky in question was in fact purchased from the various wholesale liquor dealers referred to in the record by the witnesses, the said wholesale liquor dealers being legitimate dealers, and that the whisky was delivered through these concerns and billed direct to the witnesses, and that petitioner only acted as an agent of the said wholesale liquor dealers.

(B) That the said judgment or decree of said Circuit Court of Appeals for the Fifth Circuit is contrary to the evidence and without evidence to support it, as shown by the record in said case, and said judgment or decree of said Court should have reversed, instead of affirmed, petitioner's conviction and sentence, and should have granted him a new trial in said case.

(C) That said judgment or decree of said Circuit Court of Appeals is contrary to the provisions of Section 3253, Title 26, of the United States Code, under which petitioner

was convicted, and said judgment or decree of said Circuit Court of Appeals is therefore without law to support the same.

(D) That said Circuit Court of Appeals erred in holding that the documentary evidence embodied in Forms 52-B, which were records of the Alcohol Tax Unit of the United States Government, pursuant to Section 2857 of the Internal Revenue Code, were not admissible in evidence to show that the whiskies therein listed were purchased direct from the wholesale liquor dealers filing the said Forms 52-B by the witnesses, who were the purchasers of said whiskies, it being petitioner's contention that the said Forms were so admissible in evidence for the purposes aforesaid, and that their scope should not have been limited by the Trial Judge and by the Circuit Court of Appeals in the manner in which they were so limited by the said Trial Court and the said Circuit Court of Appeals; it being petitioner's further contention that the said Forms 52-B should have been admitted in evidence as proof of a substantive fact that the whiskies were billed by the wholesale liquor dealers to the witnesses, who were the purchasers of the said whiskies, and that said whiskies were not sold by petitioner as a wholesale liquor dealer, as charged in the indictments.

(E) That the said judgment or decree of the said Circuit Courts of Appeals was erroneous, in that the said Circuit Court of Appeals erred in holding that the Trial Court did not commit error when the Trial Judge failed to declare a mistrial of its own motion, when it was apparent to the Trial Court that the jury could not agree; and further that the Circuit Court of Appeals erred in holding that the several additional charges given by the Trial Court to the jury, after the jury had deliberated at length and had reported that it was unable to reach a verdict, were not erroneous, it being the contention of petitioner that the several additional charges to the jury given by the Trial Judge

amounted to coercion of the jury in finding the defendant (petitioner) guilty.

(F) That said Circuit Court of Appeals erred in holding that the fine of $10,000 and two and one-half years imprisonment were not excessive, it being the contention of petitioner that the payment of a single tax would have authorized him to act as a dealer in all of the transactions complained of, and that if he is guilty at all, he actually committed but one offense, and that accordingly petitioner was subjected to excessive fine, imprisonment, and excessive punishment.

5. Petitioner shows that the questions sought to be presented to this Honorable Court in said case are ones of the greatest importance and merit, and that unless the decision, judgment or decree of the said Circuit Court of Appeals in said case should be reversed and set aside by this Honorable Court, petitioner verily believes that a precedent dangerous to the liberty of the citizens of this Country will be established.

Therefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, the full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in said case therein, entitled *Richard V. Jenkins, Appellant, versus United States of America, Appellee, Case No. 11248,* to the end that the said case may be reviewed and determined by this Court, as provided by the Act of Congress, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said decision, judgment or decree of said Circuit Court

of Appeals in said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

ABRAHAMS, BOUHAN & LAWRENCE,
JNO. J. BOUHAN,
Attorneys for Richard V. Jenkins, Appellant.

UNITED STATES OF AMERICA,
State of Georgia,
County of Chatham:

Personally appeared before me the undersigned officer authorized by the laws of Georgia (or of the laws of the United States of America) to administer oaths, Richard V. Jenkins, who, after being duly sworn, on oath deposes and says:

That this deponent is the appellant in the case of *Richard V. Jenkins, Appellant, versus United States of America, Appellee,* in an appeal taken by deponent from the District Court of the United States for the Southern District of Georgia, Savannah Division, to the United States Circuit Court of Appeals for the Fifth Circuit, Case Number 11248 on the Docket of said Fifth Circuit Court of Appeals, said appeal having been made by deponent from the judgment of conviction and sentence thereon on three indictments in said District Court, in which indictments deponent was charged with the offense of violating Section 3253, Title 26, of the United States Code, by carrying on in various counties in the Southern District of Georgia the business of a wholesale liquor dealer without having paid the special tax required by law, deponent having been found guilty on all the counts in the said three indictments, and sentenced by the District Court to two and one-half years imprisonment and a fine of Ten Thousand Dollars, on the said several counts of the three indictments upon which he was found guilty by the jury trying said case; that the said Circuit

Court of Appeals for the Fifth Circuit, after a hearing on said appeal, in its decision dated May 9, 1945, affirmed this deponent's conviction on all the counts in said three indictments.

That deponent has duly filed his motion with the said Circuit Court of Appeals for a stay of the mandate of said Court affirming his conviction as aforesaid, which motion has been duly granted and allowed pending deponent's application in the Supreme Court of the United States for the writ of certiorari, by which deponent seeks in good faith to have said decision reviewed and finally passed upon by the Supreme Court of the United States; that deponent seeks bona fide in good faith to prosecute said appeal, and he verily believes that he has good and meritorious grounds therefor; that among his grounds as set forth in his application for the writ of certiorari annexed hereto is one that the evidence introduced against him on the trial of said case, as shown by the record thereof, did not make out proof of violation of Section 3253, Title 26, of the United States Code, under which he was indicted, convicted and sentenced; that his conviction and sentence was without evidence to support it, was contrary to law, and that the Judges of the United States Circuit Court of Appeals for the Fifth Circuit should have reversed and set aside, as without law or evidence to support the same, deponent's conviction and sentence under the several counts of the three said indictments hereinbefore referred to.

RICHARD V. JENKINS.

Sworn to and subscribed before me this the 1st day of June, 1945.

ELLEN DEIGNAN,

[SEAL.] *Notary Public, Chatham County, Georgia.*

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IN THE
SUPREME COURT OF THE
UNITED STATES

RICHARD V. JENKINS,
Appellant

VERSUS

UNITED STATES OF AMERICA
Appellee

ABRAHAMS, BOUHAN &
LAWRENCE
Attorneys for Appellant

JOHN J. BOUHAN
OF COUNSEL
SAVANNAH, GEORGIA

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD V. JENKINS,
Appellant

VERSUS

UNITED STATES OF AMERICA
Appellee

BRIEF OF APPELLANT

STATEMENT OF THE CASE

At the May term, 1944, the Grand Jury returned three indictments, numbers 10795, 10796 and 10797, all against Richard V. Jenkins of Savannah, Georgia. The indictments were handed down in the Savannah Division of the District Court of the United States for the Southern District of Georgia (R. page 1-10) Indictment number 10795 contained one count. It charged the defendant with willful violation of Sections 3253, Title 26 of the United States Code, in that the defendant, during the period of time from the 1st day of July, in the year 1943, to the 31st day of December, 1943, did in the Counties of Chatham, Bryan and Liberty, within the Southern District of Georgia, carry on the business of a wholesale liquor dealer, without having paid the special tax required by law.

Indictment number 10796 contained two counts. In the first count it charged the defendant with the wilful violation of Section 3253, Title 26 of the United States Code, in that the defendant did on the 30th day of July, 1943, in the County of Long, within the Southern District of Georgia, carry on the business of a wholesale liquor dealer, without having paid the special tax required by law. In the second count of this indictment it was charged that the defendant did in the County of Glynn, within the Southern District of Georgia, carry on he business of a wholesale liquor dealer, without having paid the special tax required by law.

Indictment number 10797 contained two counts. In the first count it charged the defendant with the wilful violation of Section 3253, Title 26 of the United States Code, in that on the 15th day of July, in the year 1943, the defendant did in the Counties of Pierce and Ware, in the Southern District of Georgia, carry on the business of a wholesale liquor dealer, without having paid the special tax required by law.

By consent the defendant was tried on all three indictments together.

To all of the three indictments and all of the counts contained therein the defendant, Jenkins, entered a plea of not guilty. He was found guilty on all counts in all three indictments on November 16th, 1944.

The trial of this case was begun on November 14th, 1944, and concluded on November 15th, 1944, and the verdict of guilty was returned by the trial jury on November 16th, 1944. Substantially all of the counts in all of the indictments charge the same offense, with the exception of the various Counties named in the counts.

It developed from the evidence that wholesale dealers in whiskey or distilled spirits are required by the Government to keep a form known as a 52-B record, which discloses the dates, to whom whiskey is sold at wholesale, and the amount of whiskey sold to the individual. This record is a sworn record and periodically, as prescribed by regulations of the Internal Revenue Department, is filed as a Government record of the distributor of whiskey or distilled spirits by the wholesaler.

Several witnesses for the Government testified that they purchased whiskey from the defendant on several occasions in amounts in excess of five wine gallons at one time. However, from the records known as form 52-B, the witness for the Government, Mrs. Lyverse, who had in her possession the 52-B records referred to, from wholesale dealers known as the Savannah Distributing Company in Savannah, Georgia;

Richmond Distributors in Augusta, Georgia; Gate City Distributors in Atlanta, Georgia, and Campbell Liquor Store in Atlanta, Georgia, all of which were licensed wholesale dealers, testified that these sworn records were regularly filed by the wholesale dealers above referred to, and that the records disclosed that the whiskey in question sold to the various witnesses referred to were cleared thru these wholesale dealers.

It will be noted that memorandums of dates and purchases of liquor made from the records of form 52-B, which were purchases made by the witnesses referred to, by agreement of Counsel, were furnished to the reporter for the record, giving the dates of purchases, the amount purchased, and the number of wine gallons. (R. page 100)

The exhibits and evidence referred to are contained in the original record. (R. 101-108).

It was the contention of the defendant that he did not act as principal in selling this whiskey or distilled spirits, but was only working for the various wholesale dealers referred to, and that he had no right to control the sale of the whiskey or distilled spirits, but merely took orders for the delivery of same. Altho on rare occasions the defendant assisted in the delivery of the merchandise, the record discloses that in practically every instance it was delivered by other persons, several days after the defendant took the order, and after delivery of the merchandise, within a period of from one to fifteen days, the defendant would return to the place of business of the witness who testified that he purchased the whiskey and collect the money for same.

Appellant contends that the Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the District Court.

SPECIFICATION OF ERRORS RELIED UPON
ASSIGNMENT I. RECORD, PAGE 128

Upon the Government resting its case the Appellant moved for a directed verdict of not guilty, on all of the counts of the

indictments, upon the ground that the proof failed to disclose that the whiskey in question, testified by the witnesses for the Government as being purchased from Appellant, was in fact, according to the records, form 52-B, purchased from the various wholesale liquor dealers referred to in the record, which were legitimate dealers, and that the whiskey was delivered thru these concerns and billed direct to the witnesses. (R. page 111)

At the conclusion of all the evidence presented by the Appellant and Appellee, the Appellant renewed his motion for a directed verdict of not guilty, on all of the counts on all of the indictments, upon the same ground, which was overruled by the Court and exceptions allowed.

The refusal to grant the motions is relied upon as error.

ASSIGNMENT II. RECORD, PAGE 128.

This assignment of error complains of the fact that the Court erred in limiting the value of a sworn Government record. We refer to the record designated in the assignment as form 338, which in fact is form 52-B, herein referred to, and appearing of record in the record of testimony as Exhibit "A". (R. page 101-108)

These records were testified to as official Government records, which were sworn to and filed, and so far as the testimony shows, were at no time found to be incorrect. It was the contention of the Appellant that the records spoke for themselves, and the jury had the right to give them such weight as they deemed proper, and the Court erred in limiting their value and holding that he would instruct the jury that they would not be regarded as proof of substantive facts: (1) of the purchases by the persons named in the records; (2) that delivery was actually made to those persons; (3) that the quantities stated or the dates are correct, or (4) that they were billed to those persons. The Court then holding that an exception was allowed both parties, as far as the Court had ruled against them, with the observation that the Court did not believe that it had ruled squarely with either one. (R. page 130)

It was the contention of the Appellant that the records were admissible in evidence for the purpose of showing that the liquors which the Government alleged were sold by the Appellant, as a wholesaler, to the named witnesses, were in fact billed by the wholesale liquor dealers referred to direct to the witness, and was not sold by the Appellant as a wholesale liquor dealer, as charged in the indictment.

It is contended that the Court erred in restricting the evidence as stated, and in not allowing the documents to go to the jury for the purposes stated by the Appellant. (R. page 130)

The refusal of the Court to admit the above stated evidence for the purposes stated is relied upon as error.

ASSIGNMENTS III. IV. AND V. RECORD, PAGE 130-134.

These assignments are similar and can be treated as such. It will be noted from the record that the jury received the case for consideration on November 15th, 1944, after the charge of Court, and on that date a second charge was given, after the Court stated to the jury that he was informed that the jury was unable to reach a verdict, and asked if any assistance could be rendered by the Court. The Foreman of the Jury stated that it was a question of fact and he did not believe that the Court could be of much assistance, and further stated that it was not unanimously agreed that sufficient evidence had been shown by the Government that the defendant actually purchased the liquor for resale; that there were no records of sale to the defendant brought to the attention of the jury sufficient to decide the question. (R. page 121).

After having charged the jury on two occasions, the day following the Court called the jury back to the court room and stated that he was informed that they were still unable to reach a verdict, and asked if the Court might be able to further assist: inquiring as to the way the jury stood numerically.

The Court further inquired as to whether further instructions would be of any help, and the Foreman stated that he did not think so. (R. page 131-132).

It is contended that the Court should have granted a mistrial of his own accord without any motion from defendant's counsel, after having charged the jury on two occasions previous to this colloquy between the Foreman of the jury and the Judge of the Court.

Despite the fact that the defendant in the lower Court came into Court with the presumption of innocence and that presumpion followed him throughout the trial of the case, in a subsequent charge the Court charged the jury: "He does not seriously contest the fact of the sale; he does not seriously contest that they were in wholesale quantities of more than five gallons at one time to one person—***." (R. page 135)

The record discloses a complete failure on the part of the Government to show where the defendant in the lower Court obtained this whiskey, which was an important fact, as disclosed by the jury in the colloquy between the Foreman of the jury and the Court.(R. page 121). The failure of the Court to declare a mistrial of his own motion, in view of the facts disclosed from the record; the repitition contained in the three charges, and the invasion of the province of the jury to determine facts are relied upon as error.

ASSIGNMENT VI. RECORD, PAGE 134.

This assignment complains that the sentence imposed, to-wit, six months and $2,000.00 fine on each of the five counts in all of the indictments, or a total of two and one-half years and $10,000.00, is excessive; the alleged violations all being committed within the Southern District of Georgia, and, according to the contentions of the Government, was one continued enterprise, and the further fact that the total tax involved was only $110.00; it being contended that the language of the Section, to-wit: 3253, Title 26 of the United States Code, indicates that the legislative intent was to consider a violation of this Section a minor offense; the punishment being a fine of not less than $100.00 nor more than $5,000.00 and imprisonment for not less than thirty days nor more than two years. The excessive sentence is relied upon as error.

ARGUMENT

ASSIGNMENT I.

INTRODUCTORY STATEMENT

The Appellant respectfully urges that the lower Court erred upon the grounds set forth in all of the assignments of error, and shows that the record is devoid of any evidence that can justify the finding of the jury that he willfully violated the provisions of the law in question.

We call this Court's attention to the forms referred to in the opening statement of Counsel, (R. page 24) and other references thereto by the Government witness, Mrs. Lyverse, throughout her testimony that there is in existence, pursuant to Government regulations, two forms which a wholesale dealer must keep and later file as sworn documents with the Department of Internal Revenue. Form 52-A is a record which reports all whiskey received by the wholesale dealer. Form 52-B is a record showing all whiskey or distilled spirits distributed by the wholesale dealer, giving the names to whom distribution was made, the date of distribution, the amount paid for the merchandise, and the number of gallons involved in the sale. The Government completely failed in any proof as to where the Appellant received the whiskey or distilled spirits in question, but, to the contrary, undisputed evidence shows that the whiskey in question, delivered to various witnesses who testified for the Government, was cleared thru legitimate wholesale dealers and delivered to them; the Appellant merely acting as a qualified agent for the wholesale dealers and collecting the money for the merchandise.

The record further discloses, from testimony of various Government witnesses, that the merchandise was delivered to them by common carriers and/or freight lines, and it was only on a rare occasion that the Appellant was present when delivery was made. It was sometime after delivery was made that payment was made for the merchandise delivered.

There is no evidence in the record that the Appellant had any control over the sale or delivery of the merchandise, but,

to the contrary, according to the Government record, the wholesale dealers referred to presumptively had full control as to filling of orders obtained by the Appellant.

It is to be contended that in view of the disclosures made by the documentary evidence referred to this Appellant did not have the power to bring an action to enforce payment for the merchandise delivered by and thru the wholesale dealers.

We shall further contend that the Court erred in his charge to the jury in limiting the value of the documentary evidence, form 52-B, which was an important matter of evidence, and in instructing the jury that this sworn Government document was no proof of the substantive fact that the merchandise was billed to the Government witnesses, who testified that they received the merchandise. It can be said that the witnesses did not testify, nor was there proof that the merchandise, shown to have been billed to them by form 52-B, was actually received by them, for, on the contrary, the witnesses could not give any exact date, nor could they deny that the merchandise shown to have been delivered to them by this record was actually delivered to them.

It will further be contended that the Court erred, especially in view of the three separate and distinct charges of the Court and the colloquy between the Foreman of the jury and the Court, in that the record indicated that the jury was not satisfied beyond a reasonable doubt that the Government had proved all of the material allegations in the indictments. The Court invaded the province of the jury in many instances, as will hereinafter be referred to.

We respectfully maintain that the evidence is absolutely insufficient in law to justify the verdict which the Appellant received at the hands of the jury. All of this requires a resume of the important portions of the evidence, and we ask the indulgence of the Court in our effort.

ANALYSIS OF THE TESTIMONY

The testimony shows that the various Government witnesses testified that the Appellant had worked for a wholesale liquor

dealer, known as Schenley Company, in the territory in question, and that his work for this Company was as an agent. This Company was not involved, nor made any deliveries of any orders solicited by the Appellant.

The Appellant later became connected with the wholesale dealers in question and involved in this case, and solicited orders from retailers, who were the Government witnesses, in the same manner as when he was connected with and worked for the Schenley Company.

Orders which he took for the wholesale dealers for the merchandise that was delivered to the Government witnesses, who were retailers, was paid for in the same manner as when he was employed by the Schenley Company. It was in view of this testimony that the jury stated that they were not agreed that the Government had produced sufficient evidence that the defendant actually purchased liquor for resale. (R. page 121).

Therefore, under Assignment I, the Appellant respectfully contends that the alleged crime against the United States was not plainly and unmistakably shown by the testimony, so as to constitute an offense within the meaning of the Act of Congress. (Section 3253).

See: Donnelley vs. United States, 48 S. Ct. 400, 276 U. S. 505.

Certainly, in view of the disagreement of the jury as to the proof submitted by the Government; the absolute failure of the Government to prove the material allegations of the indictments; the failure to produce evidence showing conclusively that the defendant was guilty as charged, so as to remove the presumption in favor of the Appellant; the positive fact that the merchandise in question cleared thru a legitimate wholesale dealer direct to the witnesses, who were Government witnesses, and billed directly to these witnesses and delivered by common carriers, was sufficient for the Court to sustain the motion of Counsel for the Appellant for a directed verdict of not guilty on all of the counts in all of the indictments.

AGREEMENT II.

The Court materially jeopardized the rights of the Appellant by limiting the value of the documentary evidence offered by him. We refer to the memorandums taken from form 52-B showing that the merchandise in question was billed directly to the Government witnesses, who were retailers, and the evidence discloses that the merchandise, in practically every instance, was delivered to these retailers by common carriers and or freight lines; the money for the purchase of said merchandise being later paid to the Appellant, and, as contended by the Appellant, paid to him as an agent of the legitimate wholesale dealer.

The Court restricted and limited the value of this documentary evidence, which was not only an important matter of defense, but was so considered by the jury, as hereinbefore set forth.

In ruling upon the admissibility of the evidence the Court stated that he would admit the records, but would not permit the records to be received as proof of substantive fact of purchases made by the persons named in the records; or that delivery was actually made to those persons; or that the quantities stated and the dates were correct; or that they were billed to these persons.

Following the rule on the admissibility of the evidence the Court charged the jury: "So you will not consider them as proof of such substantive facts as I have enumerated, or that such liquors were actually invoiced or billed out by them, but only as records made in the ordinary course of business by the wholesale dealers." (R. page 119).

The evidence of the Government, as well as the evidence of the Appellant, not only proved in many instances, but produced every inference that the merchandise in question actually cleared, as shown upon these records, and were delivered to the retailers. Certainly, the Court restricted and limited the value of important documentary evidence, which was admissible to prove substantive facts. These records are sworn records, filed with the Government agency, subject to their

inspection and investigation, and there was no evidence that they were incorrect in any particular. These records or forms are filed and kept by the Government pursuant to a statutory requirement.

We direct this Court's especial attention to the fact that records kept by the several Governmental departments, pursuant to a construction of statutory requirements, are public records and are admissible in evidence. Such books and records are presumtively correct and are the proper subject for consideration by the jury. The weight which the jury is to attach to these records is strictly within the province of the jury, and the Court has no power to invade that province by specifically and unequivocally limiting the value which the jury may attach to same.

Gaines vs. Relf—13 L. ed. 107;
Bryan vs. Forsythe—15 L. ed. 674;
Post vs. Kendal County—105 U. S. 667; 26 L. ed. 1204;
Oakes vs. United States—174 U. S. 778; 43 L. ed. 1167;
Holt vs. United States—218 U. S. 245; 54 L. ed. 1021.

In the Oakes case, Supra, the Court held: "It would be an analogous condition of things if records of this kind, collected and preserved by the Government of the United States in public office, at great expense, were wholly inadmissible in a Court of Justice to show facts of which they offered the most distinct and appropriate evidence, and in which the nature of things can be hardly proved satisfactorily in any other manner* * *."

The Court cannot assume facts. It is the province of the jury to pass upon the facts and it is improper for the Court to instruct the jury that they may assume the existence of certain facts. Comments by the Court concerning the value of evidence are usually not assignable for error, it is true. However, this is true only when the jury is left a full opportunity to determine the issues of facts for themselves and the rules of law are properly stated. In this instance, the Court clearly and distinctly placed a limited value on the evidence by stating to the jury that they were not to accept the records as substan-

tive facts that the whiskey was actually billed or invoiced to the various witnesses by the wholesalers.

The jury has the absolute right to decide whether or not the evidence sustains or fails to sustain each and every material allegation, and the Court is not warranted to decide as a matter of law a single issue in the case and withdraw the same from the consideration of the jury.

It will be noted that the question of the entries in these records, which were substantive facts, was an important issue, and of itself could produce an acquittal.

SEE:

Dolan vs. United States—123 Fed. 52;
Smith vs. United States—157 Fed. 721-732;
Stokes vs. United States—264 Fed. 19;
Reynolds vs. United States—98 U. S. 145;
Hickory vs. United States—160 U. S. 408;
Foster vs. United States—188 Fed. 305;
Nash vs. United States—229 U. S. 373;
Patterson vs. United States—222 Fed. 599, 650.

ASSIGNMENTS III. IV. AND V.

As we have stated, these assignments are similar and can be treated as such. The assignments attack the charge of Court on the second and third charge delivered to the jury.

It will be noted from assignment three that there is set forth a coloquy beween the foreman of the jury and the Judge of the Court on the second charge. The Court inquired at length as to the matters affecting a unanimous agreement of the jury, and the Court was told by the foreman that it was strictly a question of fact, and as previously stated the foreman stated that the reason an agreement could not be reached was that the Government had not proved its case. Certainly, after the second charge had been delivered by the Court, and no agreement could be reached, and inquiry was made of the foreman before the third charge was given, and the foreman again stated that it was a question of fact and that he did not think the Court could be of any help, the Court of his own motion should have declared a mistrial.

We must agree that the trial Judge must not usurp functions of the jury, or appeal to their passions or prejudice, as the jury is naturally sensitive to the Court's expressions of opinion concerning the issues of fact in any case. Again, we direct this Court's attention to the fact that the Court in one important instance instructed the jury that the records, form 52-B, were not to be accepted as substantive facts of sales of whiskey. The Court even went so far as to ask the jury how they stood numerically, and then proceeded to instruct them that the burden of proof was not upon the Government to prove where the whiskey came from; they only had to ascertain whether Richard Jenkins sold the whiskey.

The Court was advised that he could not help the jury by further instructions and could be of no further assistance, but, despite this fact, the Court immediately, in forceful language, instructed the jury, and in many instances throughout the third charge, repeated what had been said in the first and second charges.

The Court must constantly keep in mind, especially in criminal cases, that the importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action or suggestion of great weight with the jury.

As an instance of this conduct, in the third charge of the Court instructed the jury as follows: "He does not seriously contest the fact of the sales; he does not seriously contest that they were in wholesale quantities****." (R. Assignment of error, page 133).

We feel sure that this Court will take notice that the three charges of the Court; the repititions contained therein; the expression that the Appellant did not seriously contest a material fact involved in the case, which was not correct, was sufficient to influence the jury in rendering a verdict of guilty, for his slightest word or intimation is usually received by juries with deference, and, we contend, in this case proved controlling.

We contend that the trial Judge has no right to persuade the jury in any matter relating to facts, and where remarks of

the Court are so positive and emphatic, as in this case, the jury may have believed that a finding of not guilty would have subjected them to ridicule. Therefore, the just remedy in such a case is a new trial.

SEE:

Starr vs. United States—153 U. S. 614;
Simmons vs. United States—142 U. S. 148;
Lovejoy vs. United States—128 U. S. 171

It is interesting to note the principle of law laid down in the Sixth District Court of Appeals in the case of American Tobacco Company, et al. vs. United States, Advance Sheets—147 Fed. 2nd, No. 1, pages 93 and 100 wherein the Court held: "Parole testimony adduced by the Government, in some instances rendered subject to certain qualification by documentary evidence introduced by the Appellants. How far such qualification extended, or whether it was sufficient to permit a partial, or complete disregard of the Government's proofs in any given instance, was a question for the jury."

The principle is extremely applicable to the errors complained of in the three assignments under discussion.

We, therefore, submit that the errors complained of prejudiced the rights of the Appellant and influenced the jury in rendering a verdict of guilty on all counts of all three indictments, despite the fact that the alleged violations all took place within the Southern District of Georgia.

ASSIGNMENT VI.

The offenses for which this Appellant was charged were all identical; all, as we have stated, alleged to have occurred within the Southern District of Georgia; and if the Appellant had been guilty, the alleged violations should have been treated as one offense.

In view of the excessive punishment, this Court ,even though no motion or exception was made in the lower Court, can review the errors and correct them, as the Appellate Court did in the case of Williams vs. United States, 158 Fed. page 31, wherein the defendant was sentenced to a term of eighteen months and a fine of $100.00.

In the present case the Appellant, according to the Government's contention, failed to pay a tax of $110.00, which would have prevented any prosecution, was sentenced on these three indictments to serve two and one-half years in prison and pay a $10,000.00 fine.

For these reasons we respectfully contend that the sentence was severe and excessive under the circumstances, and call the Court's attention to the case of Sykes vs. United States, 204 Fed. 909-914, where, in substance, the Court held that where personal liberty is at stake, the Appellate Courts, in the exercise of sound discretion, may notice such grave error as the absence of substantial evidence to sustain the conviction, altho questions were not properly raised in the trial court by request, objection, exception, or assignment of error.

SEE:

Fielder vs. United States, 227 Fed. 832.

The Circuit Court of Appeals, in its decision affirming the lower court, held: "The evidence shows that the Appellant had no business location at which orders were accepted, but that he conducted his business largely as a peddler, driving about the territory in a car or truck loaded with whiskey and making the sale and delivery at one time.

Appellant respectfully contends that the decision of the Circuit Court, as aforesaid, is not based upon the record, for a review of the record will disclose that it was only on a rare occasion that Appellant was in the territory, in a car or truck, and delivered whisky at the time a sale was made. The record clearly shows that in the course of the business, appellant went to the places of business, took orders for whisky as agent for the licensed wholesale dealers, and that subsequent to the taking of the orders the orders were entered upon the books of the licensed wholesale dealers for whom Appellant was working, and proper entries therefor made upon form 52-B, required to be kept by the wholesale dealers for the Internal Revenue Department.

The record further discloses that the orders so taken, as aforesaid, in practically every instance were either delivered to the purchaser by common carrier or by a truck driven by the witness, Bashelor, or a colored man.

Therefore, we respectfully contend that this Court should reverse the judgment of the Circuit Court of Appeals upon each and every assignment of error specified, for the reasons herein set forth.

Respectfully submitted,

ABAHAMS, BOUHAN, AND LAWRENCE

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 117

RICHARD V. JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 138–140) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1945 (R. 141). The petition for a writ of certiorari was filed June 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's convictions for carrying on the business of a wholesale liquor dealer without paying the special tax required by law.

2. Whether it was proper for the trial court to instruct the jury that copies of records filed by persons other than petitioner with the Alcohol Tax Unit did not constitute proof of the substantive facts contained therein.

3. Whether the trial court erred in not granting a mistrial on its own motion after the jury reported disagreement.

4. Whether the separate counts of the indictments returned against petitioner, each charging the carrying on of a wholesale liquor business at a different time and place, were based on separate offenses.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code, as amended (26 U. S. C.), are:

> § 3250. *Tax*—(a) *Wholesale dealers in liquors.*
>
> (1) *In general.*—Wholesale dealers in liquors shall pay a special tax of $110.
>
> * * * * *
>
> § 3253. *Penalties and forfeitures for nonpayment of special tax.*
>
> Any person who shall carry on the business of a * * * wholesale liquor dealer, * * * and willfully fails to pay

the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. * * *

§ 3254. (b) *Wholesale dealer in liquors.* Except as otherwise provided, every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time, shall be regarded as a wholesale dealer in liquors: *Provided,* That the Commissioner may, by regulations, with the approval of the Secretary, provide for the issuance of a stamp denoting payment of such special tax as a "wholesale dealer in wines" or a "wholesale dealer in wines and malt liquors" if, as the case may be, wines only, or wines and malt liquors only, are sold by a wholesale dealer in liquors.

* * * * *

§ 3278. *Liability in case of business in more than one location.*

The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; but nothing herein contained shall require a special tax for the storage of goods, wares, or merchandise in other places than the place of business * * *.

Treasury Regulation 20, issued June 6, 1940, 5 F. R. 2170, 26 C. F. R. Cum. Supp. 194.1 ff, provides in pertinent part as follows:

> § 194.28. *Each place of business taxable.* Except as provided in § 194.63,[1] liability to special tax is incurred at each and every place where distilled spirits, wines, or malt liquors are sold or offered for sale.
>
> § 194.29. *Places of storage.*—Special tax is not required to be paid for warehouses and similar places which are used by dealers merely for the storage of liquors and which are not places where orders for liquors are accepted.
>
> § 194.30. *Place of sale or offering for sale.*
>
> (a) The place at which ownership of liquors is transferred, actually or constructively, is the place of sale.
>
> (b) Liquors are offered for sale (1) at the place where they are kept for sale and where a sale may be effected, or (2) at any place where sales are consummated. * * *
>
> * * * * * *
>
> § 194.32. *Peddling.*—Except as set forth in § 194.63, internal revenue laws do not contemplate the peddling of distilled spirits, wines, or malt liquors, nor permit the issuance of any special tax stamp to cover peddling activities. Persons peddling liquors and not meeting the exemption in § 194.63, are subject to special tax at each place where sales are consummated.

[1] This section has no bearing on the litigation.

STATEMENT

On May 9, 1944, three indictments containing a total of five counts were returned against petitioner in the United States District Court for the Southern District of Georgia, charging that, in violation of Section 3253 of the Internal Revenue Code, he carried on the business of a wholesale liquor dealer without having paid the special tax required by law. Each count charged the carrying on of the business at a stated time in a different county or counties in Georgia. (R. 1–2, 4–6, 8–10.) By agreement of counsel the indictments were consolidated for trial (R. 20–21). Petitioner was convicted on all counts (R. 2, 6, 10) and he was sentenced to imprisonment for six months and to pay a fine of $2,000 on each count, the prison sentences to run consecutively (R. 3, 7, 11).

The evidence for the Government may be summarized as follows:

A number of retail liquor dealers in various counties in Georgia testified that they had purchased liquor from petitioner in wholesale quantities at prices above O. P. A. ceiling prices (R. 29–31, 45–46, 47, 50, 60, 69, 72–73, 79–80, 83, 84, 90). In some instances petitioner drove to the customer's place of business with the whiskey and unloaded as much as the customer could use (R. 34, 46, 92). At other times petitioner took orders from customers and delivery

was made by persons hired by petitioner (R. 36, 37, 46, 48–49, 60, 66, 75, 80, 91). Occasionally purchasers would themselves pick up the liquor at a place of storage maintained by petitioner in Savannah (R. 36, 47, 55–56, 69–70, 83–84).

The customers paid petitioner in cash and received no invoices for their purchases (R. 32–34, 37, 49, 61, 63, 69, 71, 76, 82, 85, 90–92). At one time petitioner gave a customer an invoice from a liquor store in Atlanta and told him to show it to any investigator who might come around (R. 35). When the same customers bought liquor from other wholesalers they received invoices and paid ceiling prices (R. 37, 55, 85–86). In a number of instances customers obtained liquor from petitioner after they had been unable to buy it from their regular wholesale dealers (R. 62, 65, 71, 73, 81, 92).

Petitioner told several of these customers that he was in business for himself (R. 33, 50, 74). He did not file the forms and did not pay the tax required by law of wholesale liquor dealers (R. 25–27).

ARGUMENT

1. Petitioner challenges the sufficiency of the evidence to support his convictions (Pet. 3; Br. 5–6, 9–12) on the ground that the Government did not prove that he was acting for himself rather than, as he contended, as agent for wholesale dealers. However, as set forth in the State-

ment, *supra,* several of petitioner's customers testified that he told them he was in business for himself. Moreover, the circumstances that petitioner's customers obtained liquor from him when they were unable to buy it from wholesalers he allegedly represented, that in most instances deliveries were made by persons hired by petitioner, and that payments were made in cash directly to petitioner, all warranted the jury in inferring that petitioner was acting in his own behalf as a wholesaler.

2. The only evidence introduced by petitioner on his own behalf was records filed by four wholesale liquor concerns with the Alcohol Tax Unit, pursuant to Section 2857 of the Internal Revenue Code (R. 100–108). These records listed sales by the four concerns to witnesses who had testified that they had purchased liquor from petitioner (R. 100–108). Most of the witnesses had testified that they had made no purchase of liquor from any of the four concerns other than the Savannah Distributing Co. (R. 35, 55, 93), and the purchases from the Savannah Co. to which they testified were considerably less than the records filed with the Alcohol Tax Unit purported to show (cf. R. 40 with R. 103–105; R. 54–55, 59 with R. 102; R. 65 with R. 103; R. 94 with R. 101). The employee of the Alcohol Tax Unit who produced the records testified that she had no way of knowing whether they were accurate.

She stated that if a purchaser gave a wholesaler another name as that of the buyer, the sale would be recorded as made to such other person (R. 108–110). The court admitted the records (R. 113–114), but charged the jury that they were to be considered only as statements made by such concerns "in the ordinary course of business as to sales," and that they were not to be considered as proof of any specific fact, such as whether the liquors actually were sold or delivered to the person named or whether the quantities and dates of the purported sales were correct; that the jury should give the records "just such weight and credit as you think they are entitled to in determining the guilt or innocence of the defendant" (R. 119).

Petitioner attacks this charge (Pet. 4; Br. 6–7, 12–14) as unduly limiting the evidentiary weight of these reports. There is no merit in this contention. The fact that the records were public records does not endow them with greater evidentiary value than they intrinsically possess. *Greenbaum* v. *United States,* 80 F. (2d) 113, 125 (C. C. A. 9); *Mohawk Condensed Milk Co.* v. *United States,* 48 F. (2d) 682, 685 (C. Cls). These records proved only that the wholesalers reported sales; they did not prove that the sales were in fact made.

3. Some time after the jury had retired they reported that they were unable to agree. In re-

sponse to a question from the judge, the foreman stated that there was a difference of opinion as to whether petitioner had actually purchased the liquor for resale (R. 121). The judge then instructed them that the crime charged was not the purchase by a wholesaler, but the carrying on of the business of a wholesaler without paying the tax. He told the jury that if any one of them was convinced by the evidence that he could not yield, he should stand by his convictions, but encouraged them to consider the case further (R. 120–123). The jury deliberated further and again reported disagreement (R. 124). The court then reminded them that the issue was a simple one and that the only seriously contested question was whether petitioner was acting on his own behalf or as a salesman for others (R. 124–125). In each instance, after giving his supplemental charge, the court asked if there were any exceptions, and counsel for both sides replied in the negative (R. 123, 125).

Petitioner now contends (Pet. 4–5; Br. 7–8, 14–16) that the court's additional charges were unduly coercive and that the court should have directed a mistrial on its own motion. It is well established, however, that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict. *Allen* v. *United States,* 164 U. S. 492, 501–502; *Boehm* v. *United States,* 123 F. (2d) 791, 812 (C. C. A. 8), certiorari denied,

315 U. S. 828; *United States* v. *Novick,* 124 F. (2d) 107, 110 (C. C. A. 2), certiorari denied, 315 U. S. 813. The supplemental charge given by the judge was accurate in stating that petitioner did not seriously contest the fact that sales were made and that the only contested issue in the case was the capacity in which he was acting; and, moreover, petitioner took no exception to this instruction. As the court below said, "A defendant may not gamble on the verdict and then secure a new trial if he loses" (R. 140). Cf. *Johnson* v. *United States,* 318 U. S. 189, 201.

4. Petitioner argues (Pet. 5; Br. 8, 16–18) that the payment of a single tax would have authorized him to act as a wholesaler in all the transactions involved and that since all of the sales were made in the Southern District of Georgia, the three indictments, in fact, charged but one offense, and hence that his sentences on all but one count are invalid. However, as the court below pointed out (R. 140), under Section 3278 of the Internal Revenue Code and the Treasury Regulations issued thereunder (see *supra,* pp. 3–4), petitioner was required to pay the special wholesaler's tax at each place where he sold liquor (R. 140). While there was evidence that petitioner stored some liquor at a warehouse in Savannah, the record supports the statement of the circuit court of appeals, which petitioner disputes (Br. 17), that he "had no business location at which orders were

accepted" (R. 140.) The evidence establishes that petitioner traveled about getting orders, in some instances making deliveries at the same time, and in others having deliveries made later by persons whom he hired for such purpose. Only occasionally would customers take delivery from the warehouse where petitioner stored his liquor. (See *supra,* pp. 5–6.) Petitioner was, therefore, liable for payment of the special tax at each place where the sales were consummated. Hence, the five counts of the indictments alleging sales at different times and places were predicated upon separate violations of Section 3253 of the Code, for which consecutive sentences could validly be imposed.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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